IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 96

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,

against

IRA S. BUSHEY & SONS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Stripped of exaggeration and fanciful interpretation to which at times they have been subjected, the facts shown by the Record are simple and do not involve any important question.

Following the procedure established by Congress (46 U. S. C. A. 951) respondent instituted an Admiralty suit *in rem* in the District Court, Eastern District of New York to foreclose a statutory preferred ship mortgage (46 U. S. C. A. 922) on various of petitioner's vessels given by petitioner as security for a debt on which respondent alleged a balance due and owing from petitioner (R. 57,* *cf.* C. C. A. opinion, R. 144).

* References are to pages of the Transcript of Record.

Pursuant to Admiralty Rule 10 process *in rem* was issued and most of the vessels were seized by the Marshal. As the Circuit Court opinion states (R. 144):

> "This is not only usual, but it is also the only way of proceeding in the case of these mortgages * * *."

Petitioner appeared by an attorney admitted to practice in this Court and filed answer alleging in substance that there was no longer anything due under the mortgage and asking an accounting (R. 63-74, *cf.* C. C. A. opinion, R. 145).

Petitioner made no attempt to effect the release of its vessels by complying with the provisions of either 28 U. S. C. A. 754, Admiralty Rule 12 or E. D. N. Y. Admiralty Rule XXI (*cf.* C. C. A. opinion, R. 146). Under local rule, considering the risk and expense of the Marshal's custody of 32 vessels the Court granted a motion for immediate trial made by respondent and not by petitioner although the latter proclaims an anxiety to obtain a decision (R. 58, *cf.* C. C. A. opinion, R. 146).

The case was called for trial March 7, 1945 (R. 59). Then began a colloquy which covers pages 81 to 112 of the Record and is described in the Circuit Court's opinion (R. 145-149). It ended when, after petitioner made various conditional propositions seeking to escape a trial, the taking of evidence began (R. 107) and petitioner made a formal tender in open Court, of the amount of respondent's demand (R. 108) conditioned only on receiving proper recordable satisfactions of the mortgage (R. 108). When petitioner was asked for the amount tendered it developed that such sum was to be paid by a third party only *after* satisfactions had been filed so that a new mortgage could be delivered by petitioner to such third party and recorded as a first preferred mortgage simultaneously with payment (*cf.* R. 108-109, wherein Mr. Tibbetts represented the third party.) To accommodate petitioner in the filing of

the satisfactions of the mortgage under foreclosure and in the recording of the new first mortgage to the third party, respondent's counsel accompanied petitioner's attorney to the Customs House to expedite the recording. Next morning the parties appeared before the Trial Judge where petitioner's attorney asked the Court to enter a final decree (judgment) against petitioner on the tender made the previous day. The Record reads (R. 111):

> "Mr. Gray (petitioner's attorney): Your Honor, *we are ready* to have your Honor sign a decree under our tender of yesterday afternoon.
>
> The Court: As I understand it now, the satisfactions have all been recorded and filed in the Customs House?
>
> Mr. Gray: No, sir, the satisfactions are being held over in the Customs House together with the mortgage. As soon as your Honor signs this *consent decree* then Mr. Heckman (respondent's attorney) will consent to a discontinuance of the action upon the payment of costs to the Marshal and we will then go to the Marshal's office and turn the money over.
>
> Mr. Heckman: That is not just it. I will ask the Court to sign this decree which provides for a recovery. I will sign this (the discontinuance) in the Marshal's office when you turn over the money.
>
> Mr. Gray: *That is all right.* Then the Marshal has to 'phone to the Collector of the Customs so as to release the vessels and then the mortgage and the satisfactions will be duly recorded.
>
> The Court: All right. I am now signing the order." (Italics supplied.)

The decree appears at pages 57 to 59 of the Record.

Later, petitioner brought a suit in equity to vacate the decree which it had presented to the Court and which, without reservation or protest, it had asked the Court to sign, alleging the conclusion, unsupported by factual allegations, that the decree was obtained by fraud and duress

(R. 116-140). This was dismissed for lack of jurisdiction. On petitioner's appeal the Circuit Court directed that the complaint should be deemed a petition to vacate the decree in the foreclosure suit in Admiralty, *W. E. Hedger Transportation Corporation* v. *Ira S. Bushey & Sons* (155 F. (2d) 321), and this Court denied certiorari 329 U. S. 735. After filing the mandate (R. 59) the complaint—deemed a petition to vacate the final decree—was considered by the Judge who heard the trial and signed the decree (R. 60). After a thorough and painstaking examination he denied and dismissed the petition (R. 60, Opinion, R. 7-24). By this application petitioner seeks review of the Circuit Court's decision affirming the denial and dismissal of that petition.

POINT I

The petition to vacate does not show facts constituting fraud; all facts alleged were known to petitioner before the tender and consent.

Conclusory allegations are not sufficient when fraud is asserted.

> *McCampbell* v. *Warrich Corp.*, 109 F. (2d) 115;
> *Davis* v. *State Bank of Woodstock*, 151 F. (2d) 180, *cf.* 9(b) F. R. C. P.

Facts known, or discoverable by diligence, before decree enters will not serve as ground for an application to vacate it.

> *The New England*, Fed. Case No. 10,151;
> *The Hewitt*, 15 F. (2d) 857;
> *Simkins Federal Practice Rev. Ed.* (1923), Chap. CXXI, p. 883.

Petitioner's application to vacate the decree does not charge extrinsic acts, it refers only to respondent's steps *in Court* in the litigation as acts of fraud, duress, abuse of process, etc.

As the transcript of docket entries on pages 57 to 62 of the Record shows, every step by respondent which preceded the consent decree was taken in accordance with the Admiralty Rules promulgated by this Court, supplemented by local practice rules, in the Court to which Congress granted exclusive jurisdiction in that type of case. As the Circuit Court so aptly said (R. 146):

> "The normal form of such duress is by steps taken to prevent a litigant from reaching a court to protect his interests. Here the situations are reversed. At all times the party accused of the abuse is endeavoring to get before the judge and to have the case thoroughly heard, while the party who claims to be the victim has strenuously opposed such judicial hearing."

Since its request to the Court to sign a final decree formally merging in to a judgment petitioner's admission of its liability made during trial in open Court, where it had every opportunity to present its evidence, petitioner has twice taken respondent through the Circuit Court of Appeals and this is its second attempt to gain this Court's aid in escaping the effect of that consent judgment. Its reasons, we submit are obvious. It deliberately avoided an early opportunity for a trial on the merits. It seeks to gain by indirection what it could not accomplish in the original suit, *viz.*, secure a concession of part of its debt by harassing respondent with litigation until respondent makes a settlement payment to end seemingly interminable litigation.

The Ship Mortgage Act of 1920 was passed to improve the shipping market by providing an enforceable mortgage where none existed before (*The Thomas Barlum*, 293 U. S.

21, 42). That statute may as well be stricken from the books if a defaulting mortgagor may prevent foreclosure by starting a suit for an accounting in a State Court. As this Court said in the *Thomas Barlum, supra*:

> "If a mortgage is within the Act, there can be no suit to foreclose it in a State Court;"

If petitioner was entitled to an accounting it could and should have been had in the Admiralty foreclosure proceeding *W. E. Hedger Transportation Corp.* v. *Ira S. Bushey & Sons,* 155 F. (2d) 321, cert. denied, 329 U. S. 735.

Certainly it cannot be abuse of process to resort to the only process fixed by statute and to do so openly and expeditiously before duly appointed judges whose error if any could be corrected by direct appeal. Petitioner had its day in Court and at the end of that day confessed its liability and on the following day asked the Court to adjudicate such liability by entering judgment against it.

No tender of judgment, consent decree or settlement will be acceptable to any plaintiff if the defendant may successfully vacate it by alleging only that it was made to escape a long and expensive lawsuit with resulting inconvenience, which is the petitioner's real contention here.

As this Court pointed out in *United States* v. *Ames,* 99 U. S. 35, a claimant wishing to avoid the inconvenience of having a vessel detained during litigation may apply to the Court to have the property released on giving bond. Petitioner never did that.

The Circuit Court further stated (R. 157):

> "The district judge directly familiar with the facts had refused to act after a very careful re-examination of the entire case, and his decision, so far as it was discretionary, was final * * *.
>
> "Since all the facts are now fully known, there is no occasion for a trial or for the taking of tes-

timony. It is as much the duty of the Court to protect litigants from long and utterly useless litigation as it is to afford an opportunity for trial to those deserving it. And while a Court will be astute to prevent misuse of its processes, it can hardly be expected to look with favor upon the device of obtaining postponement of effective trial by seeking a decree to be repudiated after its immediate objective has been obtained" (R. 158).

POINT II

The Circuit Court of Appeals properly affirmed the dismissal of the petition for review.

After reviewing the facts shown by the Record before it, the Circuit Court said (R. 152):

> "Nevertheless on this appeal respondent asks us to discount the history of the case as thus clearly disclosed by applying the well known and useful rule that upon dismissal of a pleading upon motion all intendments are taken in favor of the pleader, in the endeavor to support the allegations so far as possible. The difficulty with this is that it is controlled by a presently more important, apposite, and well settled principle of law that the petition must be read as though it included the facts of which the Court takes judicial notice, even though these may be contrary to some of the allegations."

POINT III

Petitioner was not entitled to a satisfaction of the mortgage before payment.

Petitioner argues that when a bond is filed in a foreclosure proceeding the mortgage must be satisfied even though the mortgagor receives no money.

If that be so then a mortgagee can be forced to accept a substitute for the security he demanded when the loan was made. Banks will not be willing to let others decide what security they shall have for the loan of their depositors' money.

United States v. *Ames*, 99 U. S. 35, cited by petitioner shows why a mortgage contract is not satisfied by substituting a bond for the mortgaged *res*. In that case the sureties on the bond became insolvent and the judgment was never paid. A person suffering the consequences of a tort must of necessity take his chances of collecting damages but a party who loans money with a vessel as security is entitled to the security of his own choosing, not some substitute therefor. If the rule be otherwise the purpose of the Ship Mortgage Act will be frustrated.

However, the point is not involved here. Petitioner never filed a bond and so cannot be heard to argue what its rights might have been in a situation which never existed. Moreover, by proper motion at the appropriate time, petitioner could have obtained a ruling on its asserted rights. Its own failure to take the proper procedural steps is not ground to vacate a decree after entry.

POINT IV

This Court has already declined to grant review of petitioner's contention that its bill in equity should not have been treated as a petition to review.

The first decision of the Circuit Court held that the bill or complaint in equity should not have been dismissed for lack of jurisdiction but should have been deemed as a petition to review (*W. E. Hedger Transportation Corp.* v. *Ira S. Bushey & Sons*, 155 F. (2d) 321). This Court denied petitioner's application for a writ of certiorari, 329 U. S. 735.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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